BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 4142 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

ANNA MAE BERG
(Claimant

S.S.A. No.

HELMS BAKERIES
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-378

FORMERLY
BENEFIT DECISION
No. 4142

The above-named employer on November 18, 1946, appealed from the decision of a Referee (R-16123-44337-46) which held that the claimant was not discharged for misconduct within the meaning of Section 58(a)(2) [now section 1256 of the Unemployment Insurance Code] of the Unemployment Insurance Act. The claim for benefits was filed on July 1, 1946, in the Los Angeles office of the Department of Employment.

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant was last employed in the cake packing department of the appellant's bakery for a period of approximately twenty-seven months, at a terminating wage of seventy-five cents per hour. She was discharged by the appellant on June 26, 1946, under circumstances hereinafter set forth. She has had no other employment experience.

On July 1, 1946, the claimant registered for work and filed a claim for benefits in the Los Angeles office of the Department of Employment. Upon receipt of notice that a claim had been filed, the appellant-employer protested the payment of benefits on the ground that the claimant had been discharged for misconduct in connection with her most recent work. After an investigation, the Department on July 16, 1946, issued a determination holding that the claimant had not been discharged for misconduct within the meaning of Section 58(a)(2) [now section 1256 of the Unemployment Insurance Code] of the Unemployment Insurance Act. The employer appealed and a Referee affirmed the determination.

The record shows that the hearing before the Referee in this case originally was scheduled for August 28, 1946. The claimant appeared at that time, but the case was continued at the request of the employer's representative because a death in the family of the employer's personnel director made it inconvenient for him to appear as a witness. The continued hearing was held on September 24, 1946, and the claimant again was present. The only witness for the employer present at the hearing was the personnel director. His testimony indicated that he was not present at the time of the discharge, and that his only knowledge of the events leading up to the discharge had been obtained through conversation with the forelady of the cake packing department. The employer's representative introduced an affidavit from the forelady, in which the latter states that she was the claimant's supervisor; that the claimant "slowed down on the job and encouraged others to do likewise;" that the claimant was impertinent and used profanity; and that the claimant had been told on numerous occasions that if her work did not improve, she would be discharged.

The claimant testified at the continued hearing that she always had performed her work properly. She denied that she had slackened her efforts, and denied that she had advised other workers to "slow down." She stated that the forelady did not warn her in advance that she might be discharged, and that she had had no complaints concerning her work prior to her discharge. She denied saying that she would not work faster, and denied the use of profanity. She said that she had received several wage increases during her period of employment, from a beginning wage of fifty cents per hour to a terminating wage of seventy-five cents per hour, which she received for the last six weeks of her work.

The forelady was not present at either hearing. When asked why she was not present, the employer's representative answered: "I don't want to tear the plant up entirely ... I don't think the Referee quite understands -- to take two or three people away to settle a matter that should be settled -- The employer has some rights." The employer's representative later said that if the hearing again could be continued, an effort would be made to have the forelady appear at the hearing and testify under oath to verify the affidavit, "if it's necessary, or if it's possible." The Referee refused to grant a continuance, and held that a preponderance of the evidence established that the claimant was not discharged for misconduct.

In appealing to this Appeals Board the appellant-employer states that: "It is our firm belief that the Referee has no right to accept the statement of a benefit-seeking employee against the sworn statement of her immediate superior, regardless of whether the superior was actually present in person or not. It is not fair to expect several people from a busy organization to take time off with corresponding disrupture of daily activities to offset the unsupported statement of a claimant whose sole job is to get benefits, who has nothing to do only appear, personally, in her efforts to collect benefits." The employer also states that the forelady will appear personally to testify -- "...if the Commission so desires."

REASON FOR DECISION

Although there is a direct conflict in the evidence it is our opinion that a preponderance thereof established that the claimant did not commit the acts alleged by the employer as the basis of a misconduct disqualification. The employer's evidence concerning these acts consisted entirely of hearsay and affidavits.

In Lacabere v. Wise (1904), 141 Cal. 556, 75 Pac. 185, the court pointed out that affidavits are not in the nature of the best evidence to prove issuable facts and that they rank on no higher plane than hearsay evidence. In Pavaroff v. Pavaroff (1942), 55 A.C.S. 27, 130 Pac. (2d) 212, (hearing in the Supreme Court granted appeal dismissed on stipulation) the court said:

> "Where cross examination was not accorded, not only was the testimony classified as hearsay but it was considered too uncertain and unreliable to be considered in the investigation of controverted facts and should therefore not be received as evidence. As an affidavit is but the ex parte sworn statement of the affiant, it was accordingly inadmissable at the common law on a controverted issue of fact... In short the common law, accepting the experience of ages, regarded cross examination of a witness or affiant as to his relation to the case or parties, his motives, if any, his means of knowledge and opportunities for information, his powers of observation and tenacity of memory as of prime importance to test the credibility and accuracy of his statements, so as to render reliance thereon safe."

Although we are not bound by the statutory rules of evidence, and the affidavit was properly admitted as evidence in this case, nevertheless in determining where the weight of evidence lies on a controverted issue we must give full consideration to the inherent weakness of the affidavit as evidence. In the instant case the claimant has appeared personally, has testified under oath and has been subjected to cross examination. She has denied the charges made against her in the affidavit. The affiant has not been subject to cross-examination and there has been no opportunity to test her means of knowledge, her sources of information, her motives, if any, or her powers of observation and tenacity of memory.

The employer's contention that we must accept an affidavit over the sworn testimony of the claimant simply because the affidavit was made by the claimant's "superior," is untenable nor do we agree with the employer's assertion that the claimant's testimony should be ignored because she is interested in the outcome of the proceeding. Her interest, of course, is one of the factors to be taken into consideration in weighing the evidence, just as also we must consider the interest of the employer whose reserve account will be affected by the payment of benefits, or the interest of a supervisor in justifying her actions, or the interest of a professional employer representative who may be concerned with retaining the business of his clients. The fact that any one of these persons may be interested in the outcome of a case does not necessarily render his testimony unreliable.

After considering all of the evidence in this case we hold that a preponderance of the evidence establishes

that the claimant did not commit the acts of which she is accused by her employer, and that she was not discharged for misconduct connected with her most recent work within the meaning of Section 58(a)(2) [now section 1256 of the Unemployment Insurance Code] of the Act.

The employer has offered to have the forelady testify, personally, "if the Commission so desires" although contending that she should not be required to appear. The Department, in this case, awarded benefits only after conducting an investigation. The employer having protested the payment of benefits, and as the appellant, should have been prepared to establish its case. The employer chose to rely upon convenience in presenting evidence in affidavit form. The claimant has already been subjected to questioning during the investigation and also has been compelled to attend two hearings. In view of the facts of this case we can see no justification for a further hearing.

DECISION

The decision of the Referee is affirmed. Benefits are granted provided the claimant is otherwise eligible.

Sacramento, California, April 18, 1947.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

TOLAND C. McGETTIGAN, Chairman

MICHAEL B. KUNZ

HIRAM W. JOHNSON, 3rd

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 4142 is hereby designated as Precedent Decision No. P-B-378.

Sacramento, California, March 7, 1978.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

HARRY K. GRAFE

RICHARD H. MARRIOTT

HERBERT RHODES